IN THE

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

GREEN FUEL ECONOMIZER COMPANY, INC.,
a New York corporation

and

NATIONAL SURETY CORPORATION,
a New York corporation, *Petitioners*

v.

ARC & GAS WELDER ASSOCIATES, INC.
a Maryland corporation, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on December 30, 1960.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (App. 30)* is reported in 182 F. Supp. 648. The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered December 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether a court in interpreting a contract may, as a finding of operative usage in an industry, define a term used in the contract in a way expressly rejected by the relevant industry's official institute.

2. Whether a term used in a contract, having no dictionary meaning, may by mere usage have such a definite meaning in a particular industry as absolutely to exclude the parties from avoiding the effect of such usage by implying a different meaning in the contract.

STATEMENT

Defendant (petitioner), as sub-contractor, contracted to erect two Cloud Chambers (for eventual use by the Army Chemical Corps) (App. 30) the stainless steel interiors of which, in place in the completed building, were required to have "No. 4 finish without pits, cracks or crevices". There was no further definition of these terms in the sub-contract, but the specifications required a "final polishing" to remove "pits,

* Except as otherwise indicated, all references to Appendix are to Appellant's Appendix in the Court of Appeals.

cracks and crevices". (App. 33). Plaintiff, (respondent here) an expert welder, sub-subcontracted with defendant to provide labor and material for, and to do the work of, "complete erection, fabrication, testing and polishing", of the Cloud Chambers. (App. 39). The specifications, above referred to, were also applicable to the sub-sub-contract. Plaintiff alleged (App.5) (and defendant conceded) that one subparagraph of this same sub-sub-contract required defendant to furnish the steel plates to plaintiff polished in accordance with the *drawings*. (App. 40). The drawings specified that the plates to be furnished by defendant were to have "No. 4 finish", but made no reference to "pits, cracks and crevices". (App. 116). Another sub-paragraph stipulated that welds were to be polished to a smoothness not exceeding 42 microinches in roughness. (App. 40).

After the erection and welding work had gone on for some weeks, the owner's inspector pointed out that there were pits, cracks or crevices in the plates, which would have to be polished out. (App. 48). The welding sub-contractor (plaintiff-respondent) spot-polished some of these and then objected that this polishing was not part of his contract. (App. 48). The defendant contended that it was. (App. 22). It was this dispute which eventually came before the Court. The plaintiff, respondent here, is a Maryland corporation; petitioner-defendant is organized and existing under the laws of New York. The United States District Court for the District of Maryland awarded plaintiff judgment in the amount of $62,881.26 plus interest (over and above the contract price) for the work of polishing out pits, cracks and crevices, and refused defendant a credit on this amount on account of damages to the mill finish which were caused during storage, erection and weld-

ing of the plates. (App. 62). The United States Court of Appeals for the Fourth Circuit affirmed.

There were two possible interpretations of the contract with respect to the scope of plaintiff's undertaking, both equally plausible, perhaps. The interpretation chosen by the Court, however, which was that plaintiff was not obliged to do any polishing other than polishing of the welds, depended upon an equivalence, if not a synonymousness between "No. 4 finish" and "No. 4 finish without pits, cracks and crevices". (C.A. Op. 7). This equivalence was established in the District Court's judgment by a finding of fact that, by usage of the stainless steel industry, No. 4 finish

> "is a finish arrived at by grinding the surface of the plate or sheet with coarse abrasives and then polishing the surface with abrasives no coarser than 120 grit. Some mills use an even finer grit, but 120 grit is standard. While the various mills do not achieve precisely the same surface smoothness for all No. 4 finish and do not *ordinarily* produce or sell No. 4 finish in terms of micro-inch measure or other specific measure of surface smoothness, the No. 4 finishes produced and sold by the various reputable mills fall within a range of surface smoothness which does not exceed 42 micro-inches. It is also recognized in the industry that to qualify as a No. 4 finish the surface of the plate must have no pits visible to the naked eye, and that all such pits are to be removed in the grinding and polishing operations necessary to produce a merchantable No. 4 finish." (See Appendix to this petition, p. 18.) (Emphasis supplied)

This finding was made despite the fact that there was before the Court the Manual of the American Iron & Steel Institute, an agency of all manufacturers of stainless steel, which stated:

> "The practicability of describing any of the [stainless steel] finishes in terms of measured limits, such as for smoothness or reflectance, has not been established." (App. 81).

The finding was also made despite the fact that the only general criterion for No. 4 finish, as stated in the Institute Manual and which defendant urged on appeal, is that the final polish must be achieved with 120 grit. (App. 81).

These criteria, which the Court's opinion expressly recognized, would stand in the way of the Court's applying the foregoing definition of "No. 4 finish" to the contract here involved, unless there is, as the opinions of the District Court and the Court of Appeals would seem to imply, some rule of law that supports as operative usage a description not "ordinarily" followed by the industry.

In view of the decisions of this Court and of the Courts of Maryland, to be cited hereafter, it must be inferred that some rule of law other than those stated by the Maryland Courts and this Court was applied in this case by the District Court and the Court of Appeals in finding such usage. Neither Court stated the rule applied, but the District Judge's admission that measured limits of smoothness are not "ordinarily" used in the industry in describing stainless steel finishes, and the Court of Appeals' holding that the District Judge's finding "was adequately supported by evidence detailed in his opinion",* would require

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* Judge Soper's statement in this particular instance must be flatly contradicted. The District Judge detailed no evidence on which his finding of the meaning of No. 4 finish was based, and the only way for the Court of Appeals to review the finding was to consider the testimony and documentary evidence printed in the Appendices of the briefs. As a matter of fact, such "evidence" as *was* detailed in the District Court's opinion was itself